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Nos. 78-7 and 78-34

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT ERVIN DELPH, JR. AND
JOHN FRANK TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

RECEA HOWELL HAWKINS AND
JOHN CLAYBURN HAWKINS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (78-34 Pet. App. A) is reported at 571 F.2d 880.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1978. A petition for rehearing was denied by the court of appeals on June 2, 1978. The petitions for a writ of certiorari were filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial showed that petitioners were engaged in multiple conspiracies rather than a single conspiracy as charged.
2. Whether the district court properly instructed the jury concerning the elements of the conspiracy offense (Pet. 78-7 only).
3. Whether the indictment gave adequate notice that the government would offer proof at trial that petitioners had received and distributed narcotics (Pet. 78-7 only).

STATUTES INVOLVED

1. 18 U.S.C. 1961 provides in part:

> (1) "[R]acketeering activity" means (A) any act or threat involving murder * * * arson * * * or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: * * * sections 471, 472, and 473 (relating to counterfeiting), Section 659 (relating to theft from interstate shipment) * * * section 1503 (relating to obstruction of justice) * * * sections 2314 and 2315 (relating to interstate transportation of stolen property) * * * or (D) any offense involving * * * importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;
>
> * * * * *
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;
>
> * * * * *

2. 18 U.S.C. 1962 provides in part:

> * * * * *
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count I). Petitioners J. C. and Recea Hawkins were also convicted of the substantive offense of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count II), and of unlawful possession of a stolen interstate shipment of shirts, in violation of 18 U.S.C. 659 and 2 (Count VI). In addition, petitioner J. C. Hawkins was convicted of unlawful possession of a stolen interstate shipment of meat and dairy products, in violation of 18 U.S.C. 659 and 2 (Counts III and V), and of knowingly receiving and disposing of a counterfeit security moving in interstate commerce, in violation of 18 U.S.C. 2315 (Count VIII). J. C. Hawkins was sentenced to consecutive terms of 20 years' imprisonment each on Counts I and II and 10 years' imprisonment each on Counts III, V, VI, and VIII, but not more than a total of 40 years' imprisonment. Recea Hawkins was sentenced to consecutive terms of 20 years' imprisonment each on Counts I and II and 10 years' imprisonment on Count VI, but not more than a total of 25 years' imprisonment.[1] Petitioners Delph and Taylor were sentenced to ten years' imprisonment on the conspiracy count with eligibility for parole at the expiration of two years.

The issues raised by petitioners relate only to their convictions on Count I of the indictment. That count alleged that petitioners agreed, in violation of the conspiracy provision of the Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO), 18 U.S.C. 1962(d), to participate in the conduct of the affairs of an "enterprise" whose purposes were to commit thefts, to receive, conceal, and sell stolen property, to receive and distribute narcotics, to obstruct justice, and to engage in other racketeering activities. The evidence supporting petitioner's conviction on that count is detailed in the opinion of the court of appeals (78-34 Pet. App. 11a-36a). In brief, the evidence shows that petitioners agreed to participate in the affairs of an "enterprise," organized under the leadership of petitioner J. C. Hawkins, to

[1] In sentencing petitioners J. C. and Recea Hawkins, the trial judge stated that it was his intention that their sentences would be fixed at terms of 40 and 25 years respectively if their convictions on counts carrying sentences in excess of that term were affirmed on appeal (Tr. 2776). Accordingly, reversal of the convictions of J. C. and Recea Hawkins on Count I, the only conviction they challenge, will not affect the total sentence finally to be imposed by the trial court. Nor would it affect their eligibility for parole. See 18 U.S.C. 4205(a).

conduct a pattern of "racketeering activity." [2] Among the specific acts proven at trial were the following:

(1) Petitioners J. C. and Recea Hawkins, who were brothers, received $4500 from William Foster for burning down a nursing home in Sparta, Georgia, on December 3, 1970 (Tr. 249-253, 562-595).

(2) Between 1971 and 1974, J. C. Hawkins supplied approximately 200 counterfeit automobile titles to petitioners Taylor and Delph, who sold them to a car theft ring (Tr. 1030-1037, 1051-1052, 1150-1151, 1227-1237, 1272, 1274).

(3) J. C. Hawkins sold a counterfeit automobile title to James Green and asked Green to steal automobiles for him (Tr. 1054, 1126-1127). Green stole several automobiles and turned them over to J. C. and Recea Hawkins (Tr. 1053-1059).

(4) In April 1972, petitioner J. C. Hawkins, assisted by Recea Hawkins, concealed and sold part of a 33,000 pound shipment of Hormel meat that had been stolen from a truck driven by petitioner Delph (Tr. 229-234, 609-613, 675-676, 684-690, 701-707). Petitioners Delph and Taylor also offered to sell some of the stolen meat to Kenneth Boyd, who

[2] A "pattern of racketeering activity" is defined by the statute to include any two acts of racketeering within a 10-year period, so long as one of the two acts occurred after the effective date of the statute. 18 U.S.C. 1961(5). Petitioners do not challenge the conclusion that a pattern of racketeering activity was established at trial.

had previously purchased counterfeit automobile titles from them (Tr. 1252-1253, 1262-1263).[3]

(5) In May 1974, at J. C. Hawkins' request, petitioner Recea Hawkins murdered a potential witness in a state criminal trial against J. C. Hawkins (Tr. 320-321, 540-558).

(6) In October 1973, J. C. Hawkins purchased and concealed a truckload of stolen Swift meat and dairy products with the aid of James Gunnells and William Foster (Tr. 268-278, 1364-1377, 1420, 1511-1515, 1685-1691).

(7) In November 1973, J. C. and Recea Hawkins, assisted by William Foster, concealed and sold a truckload of stolen shirts (Tr. 297, 300-308, 1735-1737).

(8) During the same period, petitioners engaged in a lengthy series of drug transactions:

(a) In early 1972, petitioners Taylor and Delph sold amphetamines to James Green and Kenneth Boyd.[4] The drugs had been supplied to petitioners Taylor and Delph by petitioner J. C. Hawkins. (Tr. 1245, 1270-1276).

(b) Between November 1972 and January 1973, J. C. Hawkins supplied money to various

[3] Rudolph Flanders hid some of the stolen meat and was tried in state court. J. C. Hawkins urged Flanders to select James Elliot, a neighbor of Hawkins, as a juror from the panel available at Flanders' trial (Tr. 711-712). Elliot sat on the jury, and the jury hung, resulting in a mistrial, with Elliot alone voting for acquittal (Tr. 778-780).

[4] Green and Boyd had also bought counterfeit automobile titles from petitioners (Tr. 1041, 1126-1127, 1252, 1262).

individuals to transport marijuana and amphetamines from Jamaica to Georgia (Tr. 216, 1881-1888). These transactions were eventually aborted, however (Tr. 1890).

(c) In the spring of 1973, petitioners Delph and Taylor discussed a plan with James Green to import large quantities of amphetamines and MDA into the United States from Canada (Tr. 1044-1046). Delph and Taylor went to Canada, returned with the drugs, and sold them to Green (Tr. 1046-1049).

(d) During the fall of 1973, two individuals who had purchased counterfeit car titles from petitioners Taylor and Delph agreed to go to Mexico for J. C. Hawkins to obtain cocaine and heroin (Tr. 1187-1190). One of the individuals was arrested, however, and the trip was never completed (Tr. 1190-1192, 1195).

(e) In early 1974, Larry Estes (who had previously purchased counterfeit automobile titles from J. C. Hawkins (Tr. 1531-1532)) received several deliveries of MDA from petitioner Recea Hawkins. Estes sold the MDA and turned the proceeds over to Hawkins (Tr. 1515-1530).

(f) In April 1976, J. C. Hawkins asked Bob Day, a pilot, to transport marijuana for him and also requested Day to assist in the burglary of a chemical company (Tr. 2135-2141). In May 1976, J. C. Hawkins told Day that he had recently obtained hundreds of pounds of marijuana (Tr. 2209-2210, 2144).

The evidence as a whole showed that petitioner J. C. Hawkins headed an extensive criminal enterprise that

was involved in receiving and selling stolen goods, importing and distributing narcotics, conducting arson and murder, and obstructing justice in any prosecutions brought against the participants of his organization. Petitioner J. C. Hawkins, with the assistance of his brother, petitioner Recea Hawkins, was personally involved in each of the criminal activities. Petitioners Delph and Taylor participated in the affairs of the criminal enterprise by receiving and selling stolen goods and distributing narcotics. As petitioner Delph explained to Boyd and Green when he met with them during a narcotics transaction in early 1972, "he was running for J. C. [Hawkins]" and that he and Hawkins were "partners in the deal or some kind of operation or set-up" (Tr. 1275-1276).

ARGUMENT

1. Petitioners contend that the court of appeals has violated the principles of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), by construing the RICO conspiracy provision, 18 U.S.C. 1962(d), to apply to criminal activity so broad-ranging in nature that a single conspiracy cannot be said to exist. Alternatively, they argue that they were prejudiced by a variance between the indictment and the proof at trial because the evidence showed several conspiracies, rather than only one.

a. Application of 18 U.S.C. 1962(d) to the petitioners in this case does not depart from established legal principles applicable to conspiracy prosecutions. As the court of appeals observed (78-34 Pet. App.

53a), the gist of a conspiracy under the RICO Act is an agreement to participate in the affairs of an "enterprise" by committing two or more acts of "racketeering activity."[5] The record in this case is replete with evidence that petitioners committed numerous acts of "racketeering activity" as that term is defined in 18 U.S.C. 1961(1) (*i.e.*, murder, arson, possession and distribution of stolen goods moving in interstate commerce, possession and distribution of narcotics). Petitioners do not claim that these various acts did not constitute violations of the substantive provisions of the Act. See 18 U.S.C. 1962(c). Instead, petitioners claim (78-7 Pet. 8-9; 78-34 Pet. 14) that, under *Kotteakos*, individual participation in different types of racketeering activity cannot be the basis for a single conspiracy conviction.

As the court of appeals stated, however (78-34 Pet. App. 53a; footnote omitted):

> The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through

[5] The substantive provisions of 18 U.S.C. 1962 proscribe acquisition or conduct of the affairs of an enterprise only when a "pattern" of racketeering activity, which is defined in 18 U.S.C. 1961(5) to include at least two acts of racketeering, is employed. See note 2 *supra*.

> different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective * * *.[6]

Thus, the decision in this case is consistent with the requirements of *Kotteakos* that a conspiracy be based on a mutual undertaking to accomplish an unlawful scheme. See 328 U.S. at 754-755.

Petitioners express concern, however, that this application of ordinary principles of conspiracy law to the RICO statute leads to an unwarranted expansion of individual liability. For example, under the rule of vicarious responsibility applicable to co-conspirators, see, *e.g.*, *Pinkerton* v. *United States*, 328 U.S. 640, 646, (1946); *United States* v. *Kissel*, 218 U.S. 601, 607-608 (1910), individuals who enter into a racketeering conspiracy, but whose personal participation is limited to fraud or forgery, may be held liable for more violent crimes perpetrated pursuant to the racketeering conspiracy by other conspir-

[6] The district court instructed the jury that in order to convict petitioners of conspiracy, the jury must find the existence of the conspiracy as charged in the indictment and that "the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan" (Tr. 2724). It further admonished (Tr. 2728-2729):

> * * * You can find only the existence of one conspiracy, and you must find that the defendants were each a member of the same conspiracy. We are talking about only one conspiracy.

ators. As the court of appeals observed, however (78-34 Pet. App. 57):

> * * * We perceive in this no significant extension of a co-conspirator's liability. When a person "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." *United States* v. *Andolschek*, [142 F.2d 503, 507 (2d Cir. 1944).]

See also *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947). Moreover, none of the conspirators in this case were in fact convicted on a vicarious liability theory for any of the substantive offenses committed by other conspirators.[7] Accordingly, even if it were thought that the principle of vicarious liability should not be aplied to RICO Act conspiracies, that issue is not properly presented in this case. See *United States* v. *AMREP Corp.*, 560 F.2d 539, 545 (2d Cir. 1977); *United States* v. *Brasseaux*, 509 F.2d 157, 160 n. 3 (5th Cir. 1975).

b. The court of appeals correctly held (78-34 Pet. App. 55a) that a single conspiracy was proved at trial. The evidence showed that petitioner J. C. Hawkins was the central force behind the conspiracy and was assisted by his brother Recea in each of their many criminal activities. The involvement of petitioners Delph and Taylor in these activities recurred throughout the length of the conspiracy. Under the direction of J. C. Hawkins, they sold counterfeit automobile titles, stolen meat, and illegal drugs on several occasions to individuals who also dealt directly with J. C. Hawkins in other such transactions.

[7] The evidence showed that each of the petitioners personally committed at least two acts of racketeering. None of the petitioners or other defendants was tried or convicted for substantive offenses he had not himself committed. Even though it was proven at trial that petitioners Delph and Taylor each committed several substantive offenses pursuant to the conspiracy, they were tried and convicted on the conspiracy count only.

The evidence thus established an association of individuals formed as an enterprise within the meaning of 18 U.S.C. 1961(4) to acquire illicit goods and dispose of them at a profit and for other illegal purposes. Murder and arson were committed to advance the objectives of their enterprise. The murder silenced a witness who could have exposed the conspirators' illicit activities; it also "helped to build a fear in the community which deterred potential witnesses from going to the police" (Pet. App. 57a n. 31). The arson raised capital to finance the enterprise's "purchase of stolen goods and narcotics for eventual resale at a profit" (*ibid.*). Moreover, it was later used by J. C. Hawkins and Foster "to gain the confidence of James Gunnells when they needed his help in concealing stolen meat" (*ibid.*). The evidence demonstrated that the success of the enterprise depended on a network of related functions—the acquisition of capital to obtain stolen goods and illicit drugs, the distribution of those goods for profit, and the violent enforcement of a code of silence to avoid detection.

As the court stated (*id.* at 55a), even though there was no evidence of a formal conspiracy agreement, "[w]here, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." The facts indicated that each of the petitioners knew that the enterprise in which each agreed to participate "was bigger than his role in it, and that others unknown to him were participating in its affairs" (*id.* at 56a).[8] See *Blumenthal* v. *United States*, *supra*, 332 U.S. at 549-550; *United States* v. *Ricco*, 549 F.2d 264, 270 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Mallah*, 503 F.2d 971, 976 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975); *United States* v. *Perez*, 489 F.2d 51, 62-64 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974). See also *United States* v. *Gonzalez*, 491 F.2d 1202, 1206 (5th Cir. 1974).

2. Petitioners Delph and Taylor claim (78-7 Pet. 11-12) that the trial court erred in failing to instruct the jury that petitioners could be convicted for conspiracy under 18 U.S.C. 1962(d) only if the jury found that petitioners had committed two or more acts of racketeering pursuant to the conspiracy agreement (a finding that the evidence would have supported). It is well established, however, that conspir-

[8] Indeed, as petitioner Delph admitted to others, when engaged in distributing narcotics for J. C. Hawkins, he and petitioner Hawkins were "partners in the deal or some kind of operation or setup" (Tr. 1274-1276).

acy is an inchoate crime, the essential element of which is an agreement to commit an unlawful act; actual commission of the substantive crime need not be proven. See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 694 (1975); *Iannelli* v. *United States*, 420 U.S. 770 (1975); *United States* v. *Falcone*, 311 U.S. 205, 208 (1940); *Ford* v. *United States*, 273 U.S. 593, 619 (1927). Accordingly, the trial court properly instructed the jury on the conspiracy count that they need only find that the defendants knowingly agreed to join a combination of two or more individuals to accomplish the unlawful purposes and employ the unlawful means charged in the indictment (Tr. 2723-2729).[9]

3. Finally, petitioners Delph and Taylor argue (78-7 Pet. 13-15) that the indictment did not give them adequate notice that the government would offer proof at trial of their direct participation in narcotics trafficking. This contention is without foundation. Count One of the indictment identified Delph and Taylor as members of the conspiracy and charged that it "was a further part of the conspiracy that defendants illegally trafficked in narcotic and other

[9] There is no substance to petitioners' contention (78-7 Pet. 11-12) that the court of appeals held that the evidence must show that each defendant committed substantive offenses under the RICO Act before he could be convicted of the conspiracy under the Act. The court of appeals held only that the type of agreement proscribed by 18 U.S.C. 1962(d) is one that comprehends participation in an enterprise "*through the commission of two or more* [proscribed acts of racketeering]" (78-34 Pet. App. 55a).

dangerous drugs". As the court below correctly found (78-34 Pet. App. 72a-73a), this statement in the indictment plainly afforded petitioners sufficient notice that the government would seek to prove overt acts of narcotics trafficking. *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927); *United States* v. *Lam Lek Chong*, 544 F.2d 58, 63 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *Carbo* v. *United States*, 314 F.2d 718, 733 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). In any event, it is well settled that the government may prove overt acts in furtherance of a conspiracy even if they are not alleged in the indictment. See, *e.g.*, *United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir.), cert. denied, 423 U.S. 926 (1975); *United States* v. *Perez*, *supra*, 489 F.2d at 70; *United States* v. *Ayres*, 434 F.2d 60, 61-62 (5th Cir. 1970), cert. denied, 401 U.S. 938 (1971); *United States* v. *Garfoli*, 324 F.2d 909, 911 (7th Cir. 1963).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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